

CONOCO INC.

IBLA 87-760

Decided April 3, 1990

Appeal from a decision of the Director, Minerals Management Service, denying a refund request.
MMS-86-0509-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds--Rules of Practice:
Generally

The Board adheres to its determination that the 2-year period afforded by 43 U.S.C. § 1339(a) (1982) in which an oil and gas lessee may seek a refund of a royalty overpayment commences to run upon the making of the payment for which a refund is requested.

2. Outer Continental Shelf Lands Act: Refunds--Words and Phrases

"Request for Repayment." In order to constitute a "request for repayment" within the meaning of 43 U.S.C. § 1339(a) (1982), a document must, at a minimum, affirmatively seek a repayment of royalties tendered with respect to a specific lease.

3. Outer Continental Shelf Lands Act: Refunds

No Government official has authority to waive the 2-year statutory time limit established by 43 U.S.C. § 1339(a) (1982) for filing a refund request for overpayment of royalties.

APPEARANCES: R. Carol Harvey, Esq., Houston, Texas, for appellant; Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Conoco Inc. (Conoco) has appealed from a decision of the Director, Minerals Management Service (MMS), dated July 10, 1987, declining to return a repaid royalty refund for royalty overpayments on production from well A-8, which had been completed in offshore oil and gas lease OCS-G-2353. MMS denied the appeal because it determined that Conoco had originally filed the royalty refund request after the 2-year limit established by section 10(a) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1339(a) (1982).

From December 1978 through April 1980, Conoco sold production and paid royalties from well A-8 in the LP (A-8) reservoir, at a rate set by section 102(d) of the Natural Gas Policy Act (NGPA), 15 U.S.C. § 3312(d) (1982). ^{1/} Well A-8 had been completed as a single gas well in the LP reservoir, with selectives in the LN (A-2) and LK (A-2) reservoirs. Production commenced from the A-8 well in January 1978 and was marked by rapid decline in pressure. In September 1978, however, both production and flowing tube pressure dramatically increased.

In a letter dated June 11, 1980, Conoco informed the U.S. Geological Survey (Survey) ^{2/} that the LP (A-8) reservoir was now in communication with either the LN or LK reservoir and possibly both. Noting that accountability of the reserves on a reservoir basis had already been lost and that no loss of producible reserves would occur by commingling production, Conoco formally requested permission to open the selective completions and produce all three zones simultaneously. Nothing in Conoco's letter referenced or requested issuance of a refund for excess royalty payments. On July 21, 1980, Survey approved Conoco's request to produce all three zones from the A-8 well.

As noted above, production from the A-8 well had been deemed eligible for section 102(d) pricing because it represented production from the LP reservoir, which had not been discovered prior to July 27, 1976. ^{3/} Production from the LN and LK reservoirs, however, was eligible only for section 104 pricing (15 U.S.C. § 3314 (1982)). ^{4/} When production anomalies were noticed in September 1978, Conoco undertook a study of

^{1/} Section 102(d) prices were available for, inter alia, production from reservoirs not discovered before July 27, 1976.

^{2/} The minerals management functions of the Conservation Division, Geological Survey, were transferred to MMS by Secretarial Order No. 3071 (47 FR 4751, Jan. 19, 1982).

^{3/} On May 14, 1979, after having received approval by the jurisdictional agency, Conoco submitted its well determination application to the Federal Energy Regulatory Commission (FERC). Thereafter, Conoco collected the section 102(d) rate retroactive to Dec. 1, 1978.

^{4/} There is some confusion in the record over whether the gas from the A-8 well qualified for section 104 or section 109 prices. Section 104 of the NGPA, 15 U.S.C. § 3314 (1982), established ceiling prices for natural gas committed or dedicated to interstate commerce on Nov. 8, 1978. Section 109 of the NGPA, 15 U.S.C. § 3319 (1982), established ceiling prices for natural gas which was not covered by any of the other sections of the NGPA. In its submission to FERC dated Feb. 23, 1981, discussed infra in the text, Conoco asserted that the gas was eligible for section 104 pricing. Subsequent submissions to this Department, however, have generally stated that the production was eligible for section 109 prices. We need not resolve this discrepancy since, for the periods in question, the maximum lawful prices obtainable under both section 104 and section 109 were the same. See 18 CFR 271.101, Tables I and II (1981). For purposes of consistency in the text, however, we will assume that the gas produced subsequent to the communication between the reservoirs was section 104 gas.

the LP reservoir. This study concluded that wellbore communication had occurred between the LP and LN reservoirs which allowed gas to migrate from the LN to the LP reservoir. Based on initially determined producible gas reserves, the study concluded that the original LP reservoir had actually been depleted prior to September 1978, i.e., prior to the adoption of the NGPA on November 9, 1978, and that all production thereafter had actually occurred from the LN reservoir, which was not eligible for section 102(d) prices.

By letter to Survey, dated February 20, 1981, Conoco recounted the foregoing history, noting that, pursuant to Survey's approval, production from the LP reservoir had been commingled with production from the LN and LK sands. This letter noted that "[s]ince there is no way to accurately allocate production by pricing category, we deem it necessary to disqualify High Island 110, A-8 from pricing as a Section 102, Category D," and that Conoco had "calculated and made a refund to Texas Eastern Transmission Company [Texas Eastern], the gas purchaser." ^{5/} It is important to note that, as was true with the July 20, 1980, request for permission to commingle, this letter neither mentioned nor requested issuance of a refund for excess royalty payments. Three days later, pursuant to the requirements of 18 CFR 273.302, Conoco notified FERC that it had refunded \$324,548.60, in principal and interest, to Texas Eastern.

On September 24, 1982, Conoco made a formal request for a refund of gas royalty overpayments in the amount of \$48,244.39, covering production from the A-8 well for the period from December 1978 through April 1980. By letter dated October 7, 1982, the Acting Chief, Lessee Contract Branch, Royalty Management Program (RMP) informed Conoco that "[b]efore the requested refund can be authorized, there must be an audit, reconciliation, and acceptance of the information you provided." He further advised appellant that its request was being referred to the Royalty Compliance Division for audit and that, upon notification and acceptance, the Accounting Center would authorize and request the appropriate amount of refund.

It is important to note that, prior to August 1982, MMS policy had, indeed, been to pre-audit all refund requests. However, in view of the length of time necessary to both audit and process such refund requests with respect to OCS leases, ^{6/} a review was initiated within MMS as to

^{5/} It is, of course, apparent that Survey's approval of commingled production was not the causative factor in the disqualification of the A-8 production from section 102 gas pricing. On the contrary, the wellbore failure directly led to communication between the LP and LN reservoirs and Conoco's subsequent studies established that the entire LP reservoir had been produced prior to the operative date of the NGPA.

^{6/} Requested refunds of excess royalty payments took far longer to process with respect to OCS leases as compared to onshore leases because of the statutory requirement that Congress be notified at least 30 days prior to the issuance of any refund or credit for such excess payments. See 43 U.S.C. § 1339(b) (1982). The July 20 report, discussed in the text,

possible procedural revisions which might accelerate issuance of refunds.

A July 20, 1982, report prepared by the Director, MMS, for review by the Chairman, Minerals Management Board (MMB), suggested that one change which could be made would be to make all small refund requests on a post-audit rather than a pre-audit basis. The report noted that, if such a change were implemented, "[t]he letter to the payor approving the refund would clearly and specifically state that the refund had not been audited and that it will be subject to a post-audit under the Minerals Management Service (MMS) ongoing review of payor activities." On August 9, 1982, the Chairman, MMB, approved issuance of refunds in an amount up to \$50,000 on a post-audit basis. By memorandum dated August 19, 1982, the Associate Director for Royalty Management directed that all refund requests up to \$50,000 should be immediately forwarded to the Reston Office for processing as soon as received.

On January 12, 1983, the Associate Director for Royalty Management noted that the 30-day requirement of 43 U.S.C. § 1339(b) (1982) had been met with respect to Conoco's refund application and requested that the Chief, Accounting Operations, prepare a voucher and schedule of payments to accomplish the refund. On February 15, 1983, a check issued in the amount of \$48,244.39. There is no indication that this payment was accompanied by a letter expressly informing Conoco that the refund was being issued subject to post-audit.

By letter dated October 31, 1986, the Tulsa Regional Compliance Office, MMS, informed appellant that it had conducted a post refund review of the subject request and determined that application for a refund had not been made within 2 years after the overpayment as required by 43 U.S.C. § 1339(a) (1982). MMS concluded that the refund request should have been denied and directed Conoco to repay the refund. Conoco repaid the royalty refund under protest and appealed the determination that repayment of the refund was required to the Director, MMS.

By decision dated July 10, 1987, the Director affirmed the decision of the Tulsa Regional Compliance Office. In his decision, the Director pointed out that Conoco's refund request was filed September 24, 1982, for a period ending April 1980. Reviewing appellant's earlier letters to Survey, the Director concluded that none of them had tolled or otherwise waived the statutory 2-year limit. He concluded, therefore, that the refund request was barred by section 10 of the OCSLA. Accordingly, he denied the appeal and affirmed the order to repay the refund. Conoco then pursued an appeal to this Board.

Appellant seeks reversal of the Director's decision on two independent theories. First, appellant argues that either its letter of June 11, 1980, or its letter of February 20, 1981, were sufficient to constitute a "request for repayment," within the ambit of the Board's decision in Shell

fn. 6 (continued)

pointed out that it took an average of 7.2 months to issue a refund for an OCS overpayment, regardless of the size of the refund requested.

Offshore, Inc., 96 IBLA 149, 94 I.D. 69 (1987), and, consequently, the 2-year "statute of limitations" was tolled. Moreover, appellant argues that, quite apart from whether or not its request for repayment was timely made, MMS' acknowledgement of the debt, as reflected by its issuance of the refund, constituted a waiver of the statutory bar to its claim and prohibited its subsequent reassertion in this proceeding since all claims have been disposed of through an accord and satisfaction. MMS disputes both of these contentions. We will consider these arguments seriatim.

[1] Section 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1982), authorizes reimbursement of overpayments, "if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment." The scope of this authority and the limitations imposed upon the Department's exercise thereof was explored both by this Board in Shell Offshore, Inc., *supra*, and by Solicitor Coldiron in Refunds and Credits Under the Outer Continental Shelf Lands Act, M-36942, 88 I.D. 1090 (1981). Both the Board and the Solicitor concluded that this section meant literally what it said, that the request for repayment of excess royalties must be made within 2 years after "the making of the payment." Thus, under this analysis, if the request for repayment is deemed to have not been made until September 1982, any refund would be barred since the last overpayment was made over 2 years earlier.

We note, however, that the Board's decision in Shell Offshore, Inc., *supra*, was subsequently reversed by the United States Claims Court in Chevron, U.S.A., Inc. v. United States, No. 350-87L (July 24, 1989), *cert. denied*, 104 S. Ct. 1616 (1984). In Chevron, the court held that the 2-year period commenced to run upon the rendition of the decision in Interstate Natural Gas Association v. FERC, 716 F.2d 1 (D.C. Cir. 1983), invalidating FERC's implementation of the "dry rule," when the right to a refund "had accrued" rather than on the date that royalty payments had been tendered.

This Board has, on occasion, declined to follow isolated decisions of Federal courts "where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion." Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984). ^{7/} See also Gretchen Capital, Ltd., 37 IBLA 392 (1978). Additionally, the Board has declined to follow a district court ruling, even in cases arising within that court's jurisdiction, where the decision in question was under appeal. See Mid-Continent Coal & Coke Co., 83 IBLA 56 (1984). We believe that both considerations obtain with respect to the decision of the Claims Court in Chevron, U.S.A., Inc. v. United States, *supra*.

^{7/} The decision which the Board declined to follow in that case, Oregon Portland Cement Co. v. U.S. Department of the Interior, 590 F. Supp. 52 (D. Alaska 1984), was later essentially overruled by the United States Supreme Court in United States v. Locke, 471 U.S. 84 (1985). See Red Top Mercury Mines v. United States, 887 F.2d 198 (9th Cir. 1989).

In its Chevron decision, the Claims Court attempted to juxtapose its interpretation of the statutory language found in 43 U.S.C. § 1339(a) (1982), to wit, that "the two year period in which to file a refund request began to run when the lessee made an excess payment," with the interpretation espoused by this Board in Shell Offshore, Inc., supra, which the Claims Court asserted was contrary to this interpretation. In point of fact, however, there is no disagreement on this issue. While the Board did hold that the time period commenced upon the making of the payment, the Board had expressly held that "[t]he refunds at issue did not become due because of the Interstate ruling. Payments made by producers under the dry rule were always in excess of the lawful amount; the circuit court decision merely confirmed this fact." Id. at 166, 94 I.D. at 79 (emphasis supplied). This is the essential point of conflict between the decision of the Board and the decision of the Claims Court. If the Board were correct that the royalty payments had always been excessive, the decision in Interstate being merely declarative of an existing fact, the refund requests were untimely under both the Board's and the Claims Court's interpretation of the statute.

The Claims Court based its ultimate conclusion that the 2-year statute of limitations embodied by 43 U.S.C. § 1339(a) (1982) did not commence running until the Interstate decision 8/ on the established rule that statute of limitations begin to run only when the cause of action accrues. An examination of the cases cited by the Court, however, shows how inapposite this rule was to the facts of the case before it.

The Claims Court cited the Supreme Court decision in United States v. Wurts, 303 U.S. 414 (1938). That case involved application of section 610 of the Revenue Act of 1928, which limited the commencement of suits by the United States to recover erroneous tax refunds unless brought "within two years after the making of such refund." In that case, the Commissioner of the Internal Revenue Service had erroneously approved a refund of taxes on March 15, 1932, and a refund check was duly mailed to the taxpayer on April 30, 1932. Suit was initiated to recover the overpayment on April 26, 1934, within 2 years after actual payment but more than 2 years after the

8/ The Claims Court did not, however, determine whether it was the decision of the Court of Appeals or the denial of certiorari by the Supreme Court which triggered the statute. See Chevron U.S.A., Inc. v. United States, supra at 9 n.2. We would suggest that the Court's reluctance to "make the choice between the two in deciding when plaintiffs' rights actually accrued," underlines the fallacy of the Court's ultimate conclusion that the rights did not accrue upon the making of the royalty payments subsequently deemed excessive. Indeed, attempting to apply the Claims Court's rationale to the instant case shows how slippery its theoretical basis is. Did the right accrue upon the physical communication of the LP and LN reservoirs, the point in time that appellant discovered that wellbore failure had occurred, the point in time that appellant ascertained that the LP reservoir had been entirely depleted prior to September 1978, the point in time that appellant refunded the excess payments to Texas Eastern, or the point in time that appellant informed FERC of its actions?

claim had been approved. In reversing a decision holding the suit barred by the statute of limitations, the Court noted that the United States could not have brought a suit to recover money before April 30, 1932, because, until it had refunded the taxes, there could have been no overpayment to recoup. The Court noted:

Obviously, the Government had no right to sue this taxpayer to recover money before money had been paid to him. The construction urged by respondent would allow the statute of limitations to run against recovery of an erroneous payment before any such payment is made. As said by a House Committee in reporting on a statute of limitations in a revenue act, "Logically the period of limitation should run from the date of payment, since it is at that time that the right accrues." [Emphasis added; footnote omitted.]

Id. at 418. The Supreme Court's decision is, we would suggest, in total accord with this Board's decision in Shell Offshore, Inc., *supra*.

In a similar vein, the decisions of the Court of Claims which were cited relate to accrual of the cause of action. Thus, in American Telephone & Telegraph Co. v. United States, 685 F.2d 1361 (Ct. Cl. 1982), the Court noted that issuance of a patent was a prerequisite to suit under the "second route" of relief established by 35 U.S.C. § 183 (1982), relating to claims for compensation under the Invention Secrecy Act of 1951. Accord-ingly, it held that the 6-year statute of limitations effected by 28 U.S.C. § 2501 (1982), commenced to run with respect to all claims under section 183 only upon issuance of the patent. In Sauer v. United States, 354 F.2d 302 (1965), the Court of Claims held that the right to compensation for accumulated annual leave arose only upon separation from the service and not when transfer of the leave was denied, since only upon separation did the right to compensation accrue under 5 U.S.C. § 61(b) (1964).

What all the foregoing cases have in common, and what distinguishes them from both the Chevron case and the case at bar, is that, in the former cases, the cause of action (i.e., the right to sue), had not yet accrued at the point in time at which an opposing party was attempting to argue that the statute of limitations had commenced to run. In Chevron and this appeal, however, while the ultimate success of a claim may not yet have been deter-mined, the right to sue arose upon the making of the overpayment. Essentially, the Claims Court substituted the payor's subjective knowledge that it had made an overpayment in place of the accrual of the right to seek a refund for an excess payment. But, the right to seek a refund accrues upon the making of any payment, and this right accrues independent of any knowledge that an excess payment has occurred. Indeed, applying the Claims Court approach to the facts of the Wurts case would compel the conclusion that, upon a determination by the Tax Court that a deduction formerly allowed by the IRS was improper under the law, the IRS would have 2 years from that date to initiate collection action against all past refunders, regardless of how long in the past the refunds had issued, since it was not until the Tax Court decision that the IRS was aware that it had issued erroneous tax refunds.

Moreover, an implicit factual predicate of the Claims Court's decision, namely that the appellants would have had no way of anticipating that they had made payments in excess of those lawfully due, was explicitly rejected by the Fifth Circuit Court of Appeals in Shell Offshore, Inc. v. FERC, 858 F.2d 1147 (5th Cir. 1988). That decision dealt with yet another outgrowth of the Interstate litigation. Subsequent to the Interstate decision, various gas producers filed petitions for adjustment with FERC, requesting waivers of portions of overcharges owed to gas purchasers as a result of the Interstate decision on the ground that previous royalty overpayments which the gas producers had made but for which they could not receive refunds (i.e., royalty payments made to the United States prior to Nov. 9, 1981) should be deemed uncollectible. If deemed uncollectible by the Commission, the refund obligation of the producers to the gas purchasers would have been waived for that amount. FERC denied this request and the gas producers appealed.

While agreeing that 43 U.S.C. § 1339(a) (1982) would be considered a statute of limitations for purposes of determining whether the payments made by the producers to MMS fell within the definition of uncollectibility, the Fifth Circuit held that this did not, ipso facto, establish that the producers were entitled to a waiver of the entire amount of the royalty payments to MMS.^{9/} Rather, the Court noted, the producers must also show that they had taken every reasonable opportunity to protect their rights. The analysis of the Court on this question is instructive:

Petitioners certainly should have known that the dry rule, which was highly controversial from its inception, had a high probability of being reversed, thus mandating repayments of overcharges. In fact, some producers, such as Shell, Mobil, and Sun, participated as parties in the [Interstate] litigation before the Commission and the D.C. Circuit, and therefore knew firsthand the intensity of controversy surrounding the dry rule. * * *

Shell and Columbia were even advised in writing by their pipeline customers in October and November 1981 that the dry rule was subject to challenge and possible refunds. Clearly, petitioners in this case knew of the high possibility that the dry rule would be reversed, and that they would have to make refunds.

* * * * *

In the face of the high possibility of the dry rule being reversed, the corresponding risk of being required to make refunds, and the clear requirement that notice of a possible refund be served on MMS, the petitioners responded with inaction.

^{9/} Paradoxically, in this litigation the producers argued that 43 U.S.C. § 1339(a) (1982) was a statute of limitations such that their claims against the Government were time-barred.

Petitioners could have easily sent notice to MMS of the possibility that, contingent upon the resolution of [Interstate], they might seek refunds of royalty overpayments. This would have protected their rights. * * * The petitioners, who knew or should have known of a potential refund obligation and failed or chose not to take the simple step of filing a request to obtain potential repayment, must accept the adverse consequences of that decision.

Id. at 1152-53. Thus, neither considerations of law or of equity support the conclusion that the right to seek a refund did not accrue until after the Court decision in Interstate. 10/

Finally, in addition to the substantial practical and legal problems inherent in the Claims Court decision, we also note that on January 31, 1990, a notice of appeal to the United States Court of Appeals for the Federal Circuit was filed by the Government. Accordingly, we decline to follow the decision in Chevron U.S.A., Inc. v. United States, supra, and will proceed to consideration of the instant matter consistent with the Board's holding in Shell Offshore, Inc., supra. 11/

10/ Candor compels us to admit that our decision in Shell Offshore, Inc., supra, failed to completely distinguish between accrual of a cause of action and acquisition of the knowledge that the cause of action will succeed. Thus, our decision stated that "[t]he wording 'making of the payment' in section 1339, as the present case makes abundantly clear, does not identify an event which necessarily coincides with the event by which a right to a refund accrues." Id. at 165. Similarly, in rejecting language of the Solicitor's Opinion to the effect that "the Department interprets the limitation to be 'obviously against the claim and not merely against the remedy,'" the decision declared that: "If applied to section 1339 and the present case, such an interpretation would dictate a finding that some of appellants' overpayment claims were extinguished prior to the date their payments became refundable following the circuit court's decision." Id. at 167. To the extent that anything in these two statements may be read as inconsistent with the analysis herein, it is hereby stricken.

11/ While this Board has, indeed, stayed consideration of a number of appeals which directly involve FERC Order Nos. 93 and 93A, which had instituted the "dry rule," pending resolution of the Chevron litigation, our action in those cases was based on the consideration that ultimate resolution of the Chevron appeal would directly and critically affect the cases before the Board which raised the same issues. The instant appeal, however, does not involve FERC Order Nos. 93 and 93A and, depending on the date selected (see note 8, supra), the 2-year statute of limitations could bar the claim even if the decision of the Claims Court is upheld. Accordingly, a stay in consideration of the instant appeal would not be warranted.

[2] Based on the foregoing, it is clear that if appellant's first "request for repayment" was made in its submission of September 24, 1982, this request for refund would be outside the 2-year period established by 43 U.S.C. § 1339(a) (1982), since the last payment for which a refund is requested was presumably made before the end of May 1980. ^{12/} Appellant, however, argues that both its June 11, 1980, letter to Survey requesting permission to produce all three zones simultaneously through the A-8 well and its February 20, 1981, letter informing Survey that it had refunded excess royalty payments to Texas Eastern constituted requests for repayment within the scope of the Board's discussion in Shell Offshore, Inc., supra. We do not agree.

In Shell Offshore, Inc., supra, this Board differentiated between the showing required to establish a right to a refund and the information necessary to toll the running of the 2-year period for filing a request for repayment. With respect to this latter question, the Board, finding that no formal regulations had been adopted and declining to give controlling weight to the Solicitor's Opinion, ^{13/} determined that the only standard which could be applied was the language of section 1339 itself. Id. at 173, 94 I.D. at 83. After first noting that, since the statute required that a request is to be "filed," it must be made in writing, the Board continued, "[u]ndoubtedly, to be effective a request must in some manner inform MMS of the subject of the refund rather than merely stating 'I want a refund.'" Id. at 174, 94 I.D. at 84. Beyond that, the Board declined to establish hard and fast rules.

But, even under the very relaxed approach epitomized by Shell Offshore, Inc., supra, we do not believe that the two documents referenced by appellant can fairly be said to have constituted requests for repayment. The June 11, 1980, letter to Survey which recounted the production problems encountered with the A-8 well and sought permission to produce the three zones simultaneously, not only failed to make a request for a refund, it failed to even mention any royalty payment problems whatsoever.

The letter of February 20, 1981, is more problematic since it informed Survey of appellant's determination that, because there was no way to accurately allocate production by pricing category, it was necessary to dis-qualify the A-8 well from section 102(d) pricing. ^{14/} Appellant suggests

^{12/} Royalty payments are, as a general rule, due by the end of the month following production. See Form MMS-2014. The last production month for which a refund is sought was April 1980. Thus, the payment was due no later than May 31, 1980, and the right to seek a refund therefore would accrue on the date of payment. ^{13/} But see Shell Offshore, Inc. v. FERC, supra at 1152-53.

^{14/} Even if the Feb. 20, 1981, letter could be interpreted as constituting a request for repayment sufficient to toll the running of the 2 years, it should be noted that appellant could not recover royalty overpayments for December 1978 since those payments were presumably tendered prior to Feb. 1, 1979 (see note 12, supra). Whether recovery of the January 1979

that this letter "clearly advised the U.S.G.S. that a refund of royalties would be required since a refund had been made to Conoco's gas purchaser based on a well redetermination" (Conoco's Notice of Appeal at 5). MMS responds that neither letter notified MMS that appellant sought a refund and argues that "[i]t is not MMS's responsibility to read between the lines to determine if Conoco was requesting a refund" (Answer at 4).

We find ourselves in substantial agreement with MMS. It would have been a relatively simple matter for appellant to inform MMS that, in light of the refund it had made to Texas Eastern, Conoco would be seeking a refund of excess royalties. We note, for example, that, in order to compute the amount of interest due on the refund sent to Texas Eastern, appellant had already computed the amount of the royalty overpayment to Survey. Appellant not only failed to include this information in its February 20, 1981, letter to Survey, it similarly neglected to even assert that any refund was owed to it by Survey. We recognize, of course, that knowledge of the refund to Texas Eastern might have alerted Survey officials to the likelihood that Conoco would seek a refund of royalty overpayments. But this knowledge cannot be metamorphosed into an actual request for repayment.

Nor does the record show that the officials of Conoco believed that its February 20, 1981, letter constituted a "request for repayment." Thus, its letter of September 24, 1982, did not purport to be a supplemental transmission of evidence establishing the right to a refund earlier requested. On the contrary, that letter begins: "Conoco Inc. pursuant to 43 USC § 1339 hereby requests a refund for gas royalty overpayment in connection with the above-referenced properties in the amount of \$48,244.39 (with interest as appropriate)." It is impossible to read the text of the September 24, 1982, letter to MMS as consistent with the present assertion that the request for repayment was originally made in the February 20, 1981, letter to Survey. We hold, therefore, that no request for repayment was made by Conoco until it submitted its letter of September 24, 1982.

[3] To the extent that the September 24, 1982, letter is deemed to constitute the initial request for repayment of excess royalties, each individual monthly payment for which recoupment was sought had been made more than 2 years earlier and, thus, repayment was subject to the statutory bar of 43 U.S.C. § 1339(a) (1982). Appellant, however, notes that, notwithstanding the fact that its claim might have been subject to the statutory bar, it did receive a refund check in conformity with its request. Thus, appellant argues that MMS must be deemed to have waived the statute of limitations and MMS' present attempt to reclaim the money which it refunded is, itself, barred by the accord and satisfaction earlier reached. While this element of the case introduces a fillip not present in prior appeals involving application of 43 U.S.C. § 1339(a) (1982), we believe appellant's theory is flawed both factually and legally.

fn. 14 (continued)

overpayments would be barred would depend on the date of actual tender of those royalty payments, information not contained in the present record before the Board.

While Conoco had been informed by Survey's letter of October 7, 1982, that Conoco's request would be audited prior to issuance of a refund, it is clear from the record that, pursuant to new procedures approved on August 9, 1982, the refund in question issued subject to post-audit. ^{15/} Even assuming that the Department could waive the 2-year limitation (a question examined *infra*), a policy of issuing refunds subject to post-auditing would not constitute such a waiver.

We recognize the possibility that appellant may have been unaware that its refund was issued subject to post-audit. Thus, the record does not show that appellant received a copy of the notification called for in the August 9 policy change. This omission, however, while regrettable, does not alter the fact that MMS issued the refund subject to a post-audit. This point, in and of itself, defeats any allegation that there has been an accord and satisfaction. As MMS correctly notes, a fundamental tenet of the doctrine of accord and satisfaction is that the parties *intend* to terminate the existing controversy. See *Flowers v. Diamond Shamrock Corp.*, 693 F.2d 1146, 1152 (5th Cir. 1982) ("mutual assent of the parties to settlement of a dispute is a requirement for an accord and satisfaction"); *Zurn Construction, Inc. v. B. F. Goodrich Co.*, 685 F. Supp. 1172, 1185 (D. Kan. 1988) ("mutual assent is required"). Clearly, no such intent can be ascribed to MMS where it issues a refund subject to post-audit, regardless whether or not the party receiving the refund is aware that it is subject to future audit.

^{15/} As noted above, by letter dated Oct. 7, 1982, appellant was advised that its request was being referred to the Royalty Compliance Division for audit. In point of fact, however, the Associate Director for Royalty Management had already issued a memorandum directing that all refund requests under \$50,000 be immediately forwarded to the Reston office for processing. By memorandum dated Jan. 12, 1983, the Associate Director for Royalty Management informed the Chief of the Accounting Operations Division that "[t]he 30-day requirement of Section 10 of the Outer Continental Shelf Lands Act * * * has been met." The provision referenced, 43 U.S.C. § 1339(b) (1982), prohibits issuance of any refund or credit until after the expiration of 30 days from the date of Congressional notification of the proposed refund or credit. If Congress adjourns prior to the expiration of 30 days from the date of such submission, no refund may issue until 30 days after the opening of the next session of Congress. The Senate of the United States adjourned *sine die* on Dec. 23, 1982, bringing the Second Session of the 97th Congress to a close. Thus, by law, Congressional notification of the proposed refund to Conoco had to have been made no later than Nov. 23, 1982. The report of July 20, 1982, which led to the adoption of the post-audit procedure for refund requests of \$50,000 or less had noted that verification and auditing of such claims was taking between 90 and 120 days. It is absolutely clear that Conoco's refund request could not have been both audited and submitted to Congress in the period between Oct. 7 and Nov. 23, 1982, particularly since preparation of the report to Congress would, itself, take a considerable period of time.

In any event, even had MMS intended to waive the late filing of the request for repayment, it lacked authority to so act. The law is well-settled that, with respect to statutes limiting the time period for presenting a claim against the Government, "no officer of the government has power to waive the statute of limitations." United States v. Garbutt Oil Co., 302 U.S. 528, 534 (1930); Finn v. United States, 123 U.S. 227, 232-33 (1887). Thus, the 2-year limitation effected by 43 U.S.C. § 1339(a) (1982) cannot be waived through inadvertence or intent. Thus, even if MMS had intended to waive the statutory bar, its actions did not preclude a subsequent timely demand for the return of the monies erroneously disbursed.

Appellant makes a number of additional arguments which may be more quickly disposed of. For example, appellant contends that the Comptroller General effectively settled this dispute by issuance of the refund payment to Conoco. However, as MMS pointed out, the Comptroller General was not involved in any part of this dispute and the mere issuance of a check by the Department of the Treasury does not constitute a final settlement of accounts. Indeed, if it did so, the IRS could never sue to recover erroneous tax refunds. But see United States v. Wurts, supra.

Similarly, Conoco argues that under this Board's decision in Shell Oil Co., 52 IBLA 74 (1981), it should be permitted to offset the amount it owed because of the improper refund with the amount of the overpayments which it tendered between December 1978 and May 1980. In Shell Oil Co., supra, this Board held that, where royalty payments on an oil and gas lease occurring over a period of years are being audited, royalty overpayments which occurred during the period covered by the audit could be offset against underpayments during the same audit period, even if the overpayments had occurred more than 2 years prior to the audit. What occurred herein, however, was not an audit of a lease, it was an audit of the refund. To permit appellant to offset the amount owing to the Government because of an improper refund by the amount which appellant could have recovered had it timely filed for the refund in the first instance would be, in effect, to countenance the waiver of the statutory time limit for initiating refund requests which Congress has imposed. As noted above, however, "no officer of the government has power to waive the statute of limitations." United States v. Garbutt Oil Co., supra. Nor does any officer have the authority to do indirectly what could not legally be accomplished directly. Finn v. United States, supra. Conoco's argument on this point must be rejected.

We conclude, therefore, that appellant's request for repayment was not made within 2 years of the making of the excess payments and that MMS correctly required appellant to return the erroneously approved refund. 16/

16/ Appellant has requested an opportunity for oral argument. The Board has carefully considered the arguments which appellant has presented and has concluded that oral argument would serve no useful purpose at this time. Accordingly, the request is hereby denied. 43 CFR 4.25.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director, Minerals Management Service, is affirmed.

James L. Burski
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge